

DIVISION OF ST. CROIX

records produced by her including the following:

1. Medical records of Dr. Claudius Henry which show "treatment spanning over several years including 1981, 1983, 1986 and 1998."
2. Medical records of Marlon S. Williams.
3. Medical records from Douglas Menzies including services throughout 1985; a report dated July 3, 1985 regarding prior fall in 1983 (Plaintiff's Exhibit "1"); and a chart showing "treatment extending from March 1985 through March 1997, including description of symptoms and complaints (i.e. neck pain and lower back pain in 1990, car accident in 1985, etc.) (Exhibit "2")."
4. Dr. Gary Jett's EMG report (Defendant's Exhibit "A").
5. Physical therapy records from Dr. Jett.
6. Additional records from Douglas Menzies.

Plaintiff's exhibits consisted only of the following:

1. Exhibit 1. A July 3, 1985 report from Douglas W. Menzies of the Beeston Hill Chiropractic Center. That report summarized his March 20, 1985 examination of Plaintiff with regard to a January 27, 1983 fall at Sunshine Supermarket.

2. Exhibit 2. A June 27, 1985 x-ray report from Dr. Andre Galiber concerning the January 27, 1983 fall.

Defendant provided Dr. Jett's March 14, 2000 as its Exhibit "A". The report makes reference to Plaintiff's past medical history of lower back pain (from a 1982 fall in Sunshine Market). The report does not discuss aggravation of any prior injury.

The cases cited by Kmart for the proposition that aggravation of pre-existing injury must be specifically pled are all state cases without reference to Fed. R. Civ. P. 9(g). As stated in *Matos v. Ashford Presbyterian Community Hospital, Inc.*, 4 F.3d 47, 51-52 (1st Cir. 1993):

Decisions on what needs to be pleaded by way of special damages are sparse. The tendency is liberalization..we believe the purpose is to give notice; the more natural are the dates, the less pleading is needed...

See: *Irizzary v. Ennia, N.V.*, 678 F. Supp. 957, 959 (D.P.R. 1998), (Aggravation of asthma and mental suffering were claims for special damages because they did not necessarily result from breach of contract); *Steward v. State Farm Mutual Automobile Insurance Company*, 1996 WL 153546 *3 (E.D.Pa.).

...the federal courts have regarded the requirements of Rule 9(g) that 'when items of specials are claimed, the shall be specifically stated' as requiring no more than that the categories of damages can be set forth.

Plaintiff's Complaint alleges that Plaintiff slipped and fell and suffered *inter alia* physical injuries and pain and suffering. Plaintiff's prior medical history had been disclosed and subject to discovery. Aggravation of a prior injury is a natural consequence of a fall. Plaintiff's expert witness testimony concerning aggravation of any prior injury is subject to the constraints of LRCi 26.3(b).

Upon consideration, it is hereby;

ORDERED as follows:

1. Kmart's motion is DENIED.

2. Plaintiff's Complaint is amended to include a claim for aggravation of pre-existing back pain. Fed. R. Civ. P. 15(a); *Forman v. Davis* 371 U.S. 178, 182 (1962); *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1423 (3d Cir. 1995).

3. Nothing herein shall operate to expand allowable expert witness testimony as provided in LRCi 26.3(b).

ENTER:

Dated: February 20, 2001

JEFFREY L. RESNICK
U.S. MAGISTRATE JUDGE

ATTEST:
WILFREDO MORALES
Clerk of Court

By: _____
Deputy Clerk